against their client, after they have met with the Official Assignee of Singapore on September 12, 1980 and before obtaining the leave of the Official Assignee as required by section 8 of the Bankruptcy Act. And they persist with their application, after permission had been refused, up to the hearing in this court.

In these circumstances, we make no order on the motion to adduce further evidence but order that the costs of all proceedings therein after September 12, 1980, be borne personally by the solicitors; we allow the respondent's motion to strike out the appeal with costs and we set aside the judgment of the High Court in the action.

Order accordingly.

Solicitors: *K.C. Koh & Co.; Skrine & Co.*

TARA RAJARATNAM v. DATUK JAGINDER SINGH & ORS.

[F.C. (Wan Suleiman F.J., Ibrahim Manan F.J. & Hashim Yeop A. Sani J.) July 9 & December 18, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 201 of 1979]

Practice and Procedure — Res Judicata — Orders granting appellant liberty to file a fresh action — No final decision made — Plea of res judicata must fail — R.S.C. 1957, O. 19 r. 15.

The appellant had brought an action in which she prayed for a declaration that the transfers relating to land of which she was the registered proprietress was null and void. She alleged undue influence and breach of trust and fraud. The respondents applied by summons in chambers to have the appellant's claim dismissed on the ground that the matter was *res judicata* as it was alleged that the issues had been determined and adjudicated upon in a previous action between the parties. It appeared that the appellant had filed an earlier suit but on application by the respondents the indorsement to the writ and the statement of claim were ordered to be struck out but liberty was given to the plaintiff to file a fresh action. The learned trial judge allowed the application of the respondents and dismissed the action on the ground of *res judicata*. The appellant appealed.

Held: the orders in the earlier case in granting the appelland liberty to file a fresh action showed that no final decision had been pronounced so as to estop the appellant in a subsequent litigation from disputing or questioning such decision on the merits. Therefore the plea of *res judicata* must fail.

Cases referred to:-

(1) *Republic of Peru* v. *Peruvian Guana Co.* (1887) 36 Ch. D. 489, 496.
(2) *Carl-Zeiss-Stiftung* v. *Rayner and Keeler Ltd. & Ors. (No. 2)* [1966] 2 All E.R. 536, 564.
(3) *Andavan* v. *Thong Nyik Lin* [1966] 1 M.L.J. 57.
(4) *Parsotam Gir* v. *Narbada Gir* (1898-99) L.R. 26 I.A. 175.
(5) *Pople* v. *Evans* [1968] 2 All E.R. 743.
(6) *McIlkenny* v. *Chief Constable of the West Midlands & Anor.* [1980] 2 W.L.R. 689.

[The following cases were also cited in argument: *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49; *Tong Lee Hwa* v. *Lee Yoke San* [1979] 1 M.L.J. 24; *Jenkins* v. *Robertson* (1867) L.R. 1 H.L. Sc. App. 117, 122; *Sheodan Singh* v. *Daryas Kunwar* A.I.R. 1966 S.C. 1332; *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86; *Saminathan* v. *Palaniappa* [1914] A.C. 618; *Abdullah Ashgar* v. *Ganesh Dass* A.I.R. 1917 P.C. 201; *Hunt* v. *Allied Bakers* [1956] 1 W.L.R. 1326; *Deviditta* v. *Nathu* (1912) 15 I.C. 930.]

FEDERAL COURT.

P. Cumaraswamy (*C.D. Das* and *Subranaicker* with him) for the appellant.

Ronald Khoo for the 1st & 3rd respondents.

2nd respondent in person (*qua* litigant).

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The appellant was the plaintiff in the High Court Johore Bahru Civil Suit No. 284 of 1979.

Her statement of claim is briefly this:

That prior to July 22, 1975 she was the registered proprietress of a piece of land held under C.T. No. 13817 Lot No. 6025 in Mukim Senai-Kulai, District of Johore Bahru, that she had entered into an arrangement with the 2nd respondent to transfer the land to him as security for a loan of $220,000 from him, that prior to executing a written memorandum and blank undated transfer and other related forms, there was an oral agreement relating to retransfer to appellant on repayment of that sum, that without her knowledge or consent, the first and second defendants caused 2nd defendant to be registered as proprietor, and shortly thereafter transferred the property to 3rd defendant after which they had ejected her from the property.

Appellant alleged undue influence and breach of trust by the first and second defendants, and fraud against all three.

She then prayed for a declaration that these transfers were null and void, that the 2nd, 3rd defendants and successive registered owners held and dealt with it as trustees and for her benefit, and for certain ancillary orders and declaration.

The respondents applied by way of summons-in-chambers to have the appellant's claim dismissed on the ground that the matter is *res judicata*, the issues, it was alleged having been determined and adjudicated upon in a previous action between the parties. The appellant objected on the ground that there was no provision in the Rules of the Supreme Court for this plea to be brought in this manner, but was promptly overruled by the learned judge. Since the objection was not repeated before us, possibly because counsel for the appellant was not taken by surprise in the court below, we need only remark that the proper course where a party claims that he is being vexed twice for the same cause is to plead this — see Order 19 rule 15 and the notes on *Res Judicata* in *Mallal's* Supreme Court Practice at page 261.

After hearing arguments from both sides, the learned judge allowed respondents' application, or in other words found that the doctrine had correctly been invoked and dismissed the action with costs.

The amended statement of claim in Civil Suit 261 of 1977 shows that the parties are identical, and the cause of action over the same piece of land, the same as that in Civil Suit 284 of 1979, and the substance of the prayers the same.

Let us now see how Civil Suit 261 of 1977 progressed after the writ was first filed on April 30, 1977.

On May 29, 1977 the 3rd respondent applied by summons-in-chambers under Order 25 rule 4 for an order that appellant's indorsement and statement of claim be struck out on the ground that it disclosed no reasonable cause of action. On November 26, 1978 the court ordered the statement of claim to be struck out (P51).

On the same day, as the 3rd respondent, 1st respondent also applied by summons-in-chambers to the same effect, on the same ground, as well as under Order 19 rule 27 (P82), but the application was dismissed (P91) "with liberty to file a fresh application within 3 weeks...."

Next it was the turn of 2nd respondent, who on July 10, 1977 applied by summons-in-chambers, also under Order 19 rule 27 and Order 25 rule 4 for the statement of claim to be struck out.

The court on November 26, 1978 made what we must with respect say an incomprehensible order dismissing the 2nd respondent's application with costs with liberty to file an application within 3 weeks to strike out *irrelevant portions* of the statement of claim, failing which he was to file his defence within the same period.

Then on January 27, 1979, the 1st and 2nd respondents jointly made another application to have the statement of claim struck off, and to have the action against them dismissed — again under Order 19 rule 27 and Order 25 rule 4. Since the peculiar wording of the order of March 19, 1979 is highly relevant as will appear from the judgment of the court below, the operative portion is set out in full:

"...IT IS ORDERED that all the paragraphs of the plaintiff's Statement of Claim be struck out under the Rules of the Supreme Court Order 19, rule 27 and Order 25 rule 4 and under the inherent jurisdiction of the court on the ground that it discloses no reasonable cause of action against the first and second defendants, it is frivolous...AND IT IS FURTHER ORDERED that the plaintiff be at liberty to either discontinue this action or file a fresh suit or a fresh Statement of Claim within two months from the date hereof...."

It should be noted that there was no dismissal of the action against the 1st and 2nd respondents.

Having obtained the order, the same two respondents then returned to the fray, this time with an application to have the indorsement to the writ struck out, and for an order dismissing the action against them, and on April 25, 1979 the relevant portion of the order they obtained reads as follows:

"...IT IS ORDERED that the Indorsement in this action be struck out under Rules of the Supreme Court Order 25 Rule 4 on the ground that it discloses no reasonable cause of action against the first and second defendants and the plaintiff's claim against the first and second defendants be dismissed... and liberty was given to the plaintiff to file a fresh action."

Appellant filed the writ in Johore Bahru High Court Civil Suit No. 284 of 1979 on September 10, 1979, and the respondents filed a summons-in-chambers praying that the action be dismissed on grounds of *res judicata.*

Having already remarked that the proper procedure would be to plead the defence earlier, we shall pass on to the grounds of judgment of the court below, the relevant portion of which is set out hereunder:

"In my opinion having heard the argument of both counsel in the case the principle of *res judicata* would apply and in the circumstances I allowed the defendants' application and dismissed the plaintiff's action with costs.

The plaintiff had earlier filed an action against the 3 defendants in JB HC C.S. 261/77. On March 19, 1979 the court made an Order striking out the plaintiff's Statement of Claim with liberty for the plaintiff to file afresh within 2 months from the date thereof. The matter was fully argued in open court and finally decided. It was decided that the Statement of Claim discloses no reasonable cause of action, was frivolous and vexatious, an abuse of the process of the court and may prejudice, embarrass or delay the fair trial. In that case the same counsel appeared before the court. The plaintiff was given leave to file a fresh suit but not on the same cause of action as the one which the court had earlier dismissed.

Again on April 25, 1979 in the same suit on the application by the defendants the plaintiff's action was dismissed. Same counsel appeared before the court. In this second Order the plaintiff was given leave to file a fresh action. A fresh action here meant an action not based on the same cause of action as the previous one."

In the order of March 19, 1979 the whole of the statement of claim was ordered to be struck out and yet appellant was accorded liberty to file afresh within 2 months. The learned judge explained that the leave given was to file a fresh suit but not on the same cause of action as the one the court below earlier dismissed. The later order of April 25, 1979, striking out the indorsement also gave the appellant liberty to file a fresh action. Yet his Lordship again insisted "fresh action here meant an action not based on the same cause of action as the previous one."

We are unable to see why filing a fresh action which arises out of a completely different cause of action should need leave of the court in the circumstances.

One may be excused from suspecting that the learned judge, as Mr. Cumaraswamy suggested, had misunderstood his orders. Of course the court can in appropriate cases strike out both indorsement and plea under Order 25 rule 4, but it is only in plain and obvious cases that recourse should be had to the summary procedure under the rule, for example, where the statement of claim discloses no cause of action. (See *Mallal's* Rules of the Supreme Court, page 318).

In *Republic of Peru* v. *Peruvian Guana Co.*,[1] Chitty J. remarked, "A pleading will not be struck out under this rule 'unless it is not only demurrable, but something worse than demurrable,' i.e. such that no legitimate amendment can save it from being demurrable."

It certainly does not appear to us that the claim does not disclose a cause of action, and the only logical inference to be drawn from the fact that liberty was given in each order to file a fresh action, is that the trial judge thought that amendment could have saved the action.

In *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd. & Ors. (No. 2)*[2] Lord Guest said,

"The rule of estoppel by *res judicata*, which is a rule of evidence, is that where a final decision has been pronounced

by a judicial tribunal of competent jurisdiction over the parties to and the subject-matter of the litigation, any party or privy is estopped in any subsequent litigation from disputing or questioning such decision on the merits."

Put in another way,

"To invoke the doctrine of *res judicata* the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also the matter directly and substantially in issue has been heard and finally decided by the court which heard it."

per Ismail Khan J. (as he then was) in *Andavan* v. *Thong Nyik Lin.*[3] In *Parsotan Gir* v. *Narbada Gir,*[4] a Privy Council decision on an appeal from the High Court at Allahabad, their Lordships held that where a former suit between the same parties in the same court and for the same relief resulted in a decree of dismissal, the judgment leaving it open to the plaintiffs to bring a fresh suit and "leaving untouched and undecided" all matters affecting the rights of the parties, such a decree does not constitute *res judicata,* not being a final decision of the suit.

Another decision cited to us which is of assistance is that in *Pople* v. *Evans*[5] wherein it was held that estoppel by *res judicata* could not be maintained merely by reason of the dismissal of an action for want of prosecution, for the estoppel by *res judicata* was intended to be limited to the decision of issues on their merits e.g. when orders were made on trial or on admission or by way of compromise.

In a further written submission made by the 2nd respondent a few days after the hearing of this appeal, to which counsel for the appellant duly replied, our attention was drawn to the recent Court of Appeal decision of *McIlkenny* v. *Chief Constable of the West Midlands & Anor.*[6]

The principles applied therein have been amply enunciated in the authorities we have already considered, and we find nothing in that decision which is of assistance to the respondents' case.

Two other proceedings, Sessions Court (J.B.) Civil Action 146 of 1976, and Johore Bahru Originating Motion No. 46 of 1977 were raised for the first time in 2nd respondent's written submissions, in support of the plea of *res judicata,* but were not raised in the court below as the judgment and records make abundantly clear. We agree with counsel for the appellant that respondents cannot raise these new grounds, regarding which nothing was mentioned in the court below to support their contention that *res judicata* applies.

We are of the view that the two orders in granting the appellant liberty to file a fresh action can only mean that no final decision has been pronounced so as to estop the appellant "in any subsequent litigation from disputing or questioning such decision on the merits", so that the plea of *res judicata* must fail.

We would allow this appeal with costs.

Appeal allowed.

Solicitors: *Subranaicker & Co.; Suppiah & Singh.*

LAND EXECUTIVE COMMITTEE OF FEDERAL TERRITORY v. SYARIKAT HARPER GILFILLAN BERHAD

[F.C. (Raja Azlan Shah Ag. L.P., Syed Othman & Salleh Abas F.JJ.) October 2 & December 22, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 151 of 1979]

Administrative Law — Declaration — Application for declaration — Decision of Director of Lands and Mines that applicant must apply for change of category of land use — No appeal lodged against decision — Application for declaration that applicant not required to apply for change of category prior to application for amalgamation and subdivision — Land endorsed for planting of fruit trees — Block of flats erected on land — No jurisdiction to entertain claim for declaration — National Land Code, ss. 53(2), 124(1)(a), 137, 148 & 418.

Land Law — Condition of use of land for planting fruit trees — Flats built on part of land — Sale of part of land with flats — Application for subdivision — Necessity to apply for change of category of land use — National Land Code, ss. 53(2), 124(1)(a), 137, 148 & 418.

In this case the respondents were the registered owners of two pieces of land in the Federal Territory. The condition of use endorsed on the extracts of title was "fruit trees". The respondents agreed to sell a part of the said land on which was erected a block of flats. They applied for amalgamation and subdivision of the land but they were told by the Director of Lands and Mines that they should first apply for a change of category of land use. The respondents did not appeal against the decision of the Director but applied by originating summons for a declaration that upon the true construction of the National Land Code they are not required to apply for a change of category of land use prior to the application for amalgamation and subdivision. The appellants applied to set aside the originating summons on three grounds (a) there was no provision in the National Land Code to enable the Court to grant the declaration sought; (b) the respondents had failed to exercise their right of appeal pursuant to section 418 of the National Land Code and (c) the matter complained of was time-barred by virtue of section 2(a) of the Public Authorities Protection Ordinance, 1948. The learned trial judge dismissed the application of the appellants and they appealed to the Federal Court.

Held: (1) on a proper reading of section 418 of the National Land Code it is clear that Parliament by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The court therefore has no jurisdiction to entertain the claim sought by the declaration;

(2) in any event, where as in this case the land is held under a land office title and by section 53(2) of the National Land Code the implied category of land use is agricultural and while the continued use of the land for the flats built on it is lawful under the proviso, it is necessary for the proprietor to apply for the imposition of a category of land use, before the issue of title to the sub-divisional portion.

Cases referred to:-

(1) *Baraclough* v. *Brown & Ors.* [1897] A.C. 615.

(2) *A. Subramaniam* v. *S.M.R.M. Muthiah Chetty* [1934] M.L.J. 222.

(3) *Chop Chuah Seong Joo* v. *Teh Chooi Nai & Ors.* [1963] M.L.J. 96.

(4) *Sundaram* v. *Chew Choo Khoon* [1968] 1 M.L.J. 90.

(5) *Metal Industry Employees Union* v. *Registrar of Trade Unions & Ors.* [1976] 1 M.L.J. 220.

(6) *Barnard & Ors.* v. *National Dock Labour Board & Ors.* [1953] 2 Q.B. 18.

(7) *Francis* v. *Yiewsley and West Drayton Urban District Council & Ors.* [1960] A.C. 260.

(8) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260.

(9) *Punton & Anor.* v. *Ministry of Pensions and National Insurance (No. 2)* [1964] 1 All E.R. 448.

(10) *South-East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic*